Filed 4/25/06 P. v. Rangel CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARTIN RANGEL, Defendant and Appellant.	E037465 (Super.Ct.No. RIF113504) OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed as modified.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont, Senior Deputy Attorney General, and Andrew S. Mestman, Deputy Attorney General, for Plaintiff and Respondent.

Martin Rangel appeals his conviction for transporting methamphetamine and resisting arrest. We affirm the conviction but modify his presentence custody credits.

PROCEDURAL HISTORY

Defendant Martin Rangel (defendant) was charged with one count of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), with an allegation that he had suffered a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (c). He was also charged with one misdemeanor count of resisting, delaying and obstructing a peace officer, in violation of Penal Code section 148, subdivision (a). The information alleged that defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (c) & (e), 668, 1170.12, subd. (c)(2)), and had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

A jury found defendant guilty on both counts. In a bifurcated proceeding, the court found all special allegations true. The court sentenced defendant to 10 years in state prison. Defendant filed a timely notice of appeal.

FACTS

At 3:02 a.m. on November 19, 2003, Riverside Police Officers Camp and Turner observed a maroon Buick apparently driving in excess of the speed limit in the opposite direction. Officer Turner, who was driving, made a U-turn with the intention of pacing the Buick to determine more accurately whether it was exceeding the speed limit. The Buick turned onto a side street and stopped abruptly in the middle of the street.

Defendant jumped out of the passenger door and began to run. He dropped an object which was later determined to be a sheathed knife.

Officer Camp pursued defendant and ultimately located him hiding beneath a parked car. Officer Camp ordered defendant to come out, and he complied. Officer Camp observed several white pills on the ground under the car. He asked defendant what they were, and defendant replied that they were mints, a fact Officer Camp apparently confirmed.[1] Defendant consented to a search of his pockets. Officer Camp found two bindles of white crystalline powder in the coin pocket of defendant's pants. The contents were determined to be methamphetamine. The bindles weighed .17 grams and .13 grams, respectively, a usable quantity.

DISCUSSION

The Evidence Supports the Conviction for Transporting a Controlled Substance

Defendant contends that the evidence is insufficient to support the conviction for transporting methamphetamine because neither his act of riding in a moving vehicle nor running with methamphetamine in his pocket constitutes transportation "in the truest sense." He argues that the amount was too small to constitute evidence that he was trafficking in methamphetamine, and that there was no evidence as to his purpose in exiting the vehicle and running. The argument fails.

[1] There is no reference in the record to the pills being contraband.

Preliminarily, we note that although defendant asserts that the standard of review is substantial evidence, in reality his contention is that neither riding in a vehicle while in possession of an illegal drug nor running with the drug on one's person constitutes transportation within the meaning of Health and Safety Code section 11379 as a matter of law unless there is evidence that the defendant was transporting the drug with the intention of selling it. This is a legal question, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422 [interpretation of statute is question of law].)

Section 11379 of the Health and Safety Code provides in pertinent part that "every person who transports . . . any controlled substance [of specified types], unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of two, three, or four years." (Health & Saf. Code, § 11379, subd. (a).) The essence of the crime is carrying or conveying a usable quantity of a controlled substance from one location to another with knowledge of its presence and of its controlled character. (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 683-685.) The statute is intended "'to inhibit the trafficking and proliferation of controlled substances by deterring their movement.' [Citations.]" (*Id.* at p. 683.) This purpose is effectuated by discouraging "*any* illicit transportation of controlled substances" from one location to another. (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1317; see also *People v. LaCross* (2001) 91 Cal.App.4th 182, 185; *People v. Ormiston*, *supra*, 105 Cal.App.4th at pp. 684-685.) It is irrelevant

that the drug may be possessed for personal use rather than for sale. (*People v. Ormiston, supra*, at p. 683.) The method of transportation is also irrelevant – the substance may be carried by a person riding in a car, riding a bicycle, or walking from one location to another. (*Id.* at pp. 684-685; *People v. LaCross, supra*, 91 Cal.App.4th at p. 185.) Here, defendant had the controlled substance in his pocket while riding in a car being driven from one location to another and while fleeing on foot from the police. This is sufficient to support a conviction for illegal transportation of a controlled substance.

Omission of an Element of the Offense of Transportation from the Jury Instruction Was Harmless

On the charge of transporting methamphetamine, the court instructed the jury using CALJIC No. 12.02. The instruction stated that in order to find the defendant guilty of transporting methamphetamine, the jury had to find that he "transported a controlled substance" and that he "knew of its presence and nature as a controlled substance." The third element of the offense, that the substance transported must be in an amount "sufficient to be used as a controlled substance" (see *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746), was omitted. (Use note to CALJIC No. 12.02.) Defendant contends that the error requires reversal because it relieved the prosecution of proving an essential element of the offense beyond a reasonable doubt.

Omission of a single element of an offense from the instructions to the jury does not require reversal if it appears beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Flood* (1998) 18 Cal.4th 470, 502-504.) If the

evidence concerning the omitted element is "overwhelming, uncontradicted, or dispositive," the error may be deemed harmless beyond a reasonable doubt. (*People v. Avila* (1995) 35 Cal.App.4th 642, 663, citing *Rose v. Clark* (1986) 478 U.S. 570, 583.)

Here, both officers testified that the methamphetamine seized from defendant was a usable quantity. The defense did not cross-examine either officer on that issue, nor did it present any affirmative evidence that the amount of methamphetamine defendant was carrying was not a usable quantity. The evidence was thus uncontradicted, and the defense essentially conceded the issue. (*People v. Flood*, *supra*, 18 Cal.4th at p. 505.) The error was therefore harmless beyond a reasonable doubt.

The Conviction for Resisting Arrest Is Supported By Substantial Evidence

Defendant argues that the evidence is insufficient to support his conviction for resisting, delaying or obstructing a police officer because the evidence reasonably supports the conclusion that defendant did not know that the car was about to be stopped by the police. He argues that the evidence showed that it was dark and that the officers did not activate their lights or siren, and that there was no evidence that he or his brother (the driver of the car) behaved suspiciously prior to stopping the car, so as to support an inference that they knew they were being followed by the police. Moreover, Officer Camp never called out that he was a police officer as he pursued defendant.

This argument ignores the standard of review. Upon a claim of insufficient evidence, our role is to review the record and determine whether, based on the entire record, a rational trier of fact could have found the defendant guilty beyond a reasonable

doubt. We must view the evidence in the light most favorable to the judgment below and must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. If the evidence, viewed in that light, supports the judgment, it is irrelevant that a rational trier of fact could have drawn inferences more favorable to the defendant. (See, e.g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The elements of a violation of Penal Code section 148, subdivision (a), are as follows: (1) the defendant willfully resisted, delayed or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) A violation of the section occurs when a person runs away from an officer, knowing that the officer wanted to detain and talk to him. (*People v. Allen* (1980) 109 Cal.App.3d 981, 983-984, 986-987.)

Here, the evidence showed that the marked police car made a U-turn, followed defendant's car for some distance and turned onto an adjacent street immediately after defendant's car made the turn. Defendant's car stopped abruptly in the middle of the street, forcing the police car to stop as well, and defendant jumped out and began to run, dropping an object as he ran. Defendant was carrying a usable quantity of methamphetamine. A rational trier of fact could infer that defendant knew the police were in pursuit and elected to flee in order to avoid being searched and having the methamphetamine confiscated. This is sufficient to support the conviction.

The Court Properly Imposed a Concurrent Term on Count 2

Defendant contends that his concurrent term on count 2 should instead have been stayed pursuant to Penal Code section 654. He contends that both offenses were incident to a single criminal objective because his objective in fleeing was to avoid apprehension and the recovery of the methamphetamine.

Whether a course of criminal conduct is divisible into multiple acts which can be punished separately depends upon the intent and objective of the actor. If the offenses were incidental to a single objective, the defendant may be punished only for one offense. If the offenses were not merely incidental to a single objective, the defendant may be punished separately, even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. The defendant's intent and objective are factual questions for the trial court to resolve, and on appeal, those findings are reviewed in the light most favorable to the trial court's decision, presuming the existence of every fact the trial court could reasonably have deduced. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.)

Multiple punishment may be imposed where the defendant commits one offense with one intent, then, as an afterthought, forms the independent intent to commit a second offense. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393.) Here, the evidence showed that defendant first acted pursuant to the objective of transporting the methamphetamine and then, after realizing that the police were in pursuit, acted with the independent objective of escaping arrest. His decision to flee was not merely in

furtherance of his original objective. Thus, separate punishment was not precluded by Penal Code section 654.

The Court Did Not Abuse Its Discretion By Denying Defendant's Motion to Strike His Strike Prior

Defendant contends that the trial court abused its discretion when it declined to strike his strike prior for sentencing purposes. He contends that the court should have given more consideration to the minor and non-aggravated nature of his offenses, past and present.

A trial court's discretion to strike a strike prior is limited. The court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside [the spirit of the three strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of on or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, defendant has an extensive criminal history, dating back to 1990, consisting of two prior felonies and multiple misdemeanors, many of them parole violations. His strike prior conviction, for robbery, occurred in 1999. He was paroled in early 2003 and committed the current offenses in November 2003. He was on parole at the time of the current offenses. The trial court found that although the current offense was not serious one, defendant had shown a continual pattern of criminal behavior throughout his adult

life. Further, the court found defendant had demonstrated an inability to comply with the terms and conditions of parole. Accordingly, the court declined to exercise its discretion to strike the strike prior. Based on the record, we cannot say that the trial court's finding that defendant is not outside the spirit of the three strikes law was an abuse of discretion.

Defendant Is Entitled to Additional Presentence Custody Credits

Defendant contends that he is entitled to one additional day's credit for actual time served prior to sentencing and to an additional 27 days in presentence conduct credits. Respondent contends that the court correctly calculated defendant's actual time served, but concedes that the court erred in calculating his conduct credits.

Defendant was on parole when he was arrested on November 19, 2003. On the parole violation, he agreed to accept 12 months straight custody, which expired on November 19, 2004. He was sentenced in the current matter on February 4, 2005. The court calculated his presentence custody credits from November 20, 2004, through February 4, 2005, the date of sentencing, inclusive.

The parties concur that defendant was not entitled to credits for time spent in custody which is attributable to the parole violation. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Defendant argues that the court erred by calculating his custody credits "from and after November 20, 2004, the day following custody on the parole matter terminated [*sic*], to the date of sentencing, February 4, 2005. . . . The court calculated actual time at 76 days. That calculation . . . should have been 77 days . . . [because] [c]ustody credits are calculated [from] the day of arrest, to and including the day of

sentencing when the defendant has remained in custody." We do not understand the argument. The 12-month custody period attributable to the parole violation apparently ran from November 19, 2003, through November 19, 2004, inclusive. Defendant does not argue otherwise. Defendant was thus entitled to credit against his current sentence from November 20, 2004, through February 4, 2005, inclusive, a period both parties calculate as 76 days.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to issue an amended abstract of judgment forthwith, reflecting presentence custody credits in the amount of 76 days in actual credit and 38 days in conduct credit, and to provide copies to the Department of Corrections and to the Attorney General and to counsel for defendant.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.